No. 93-438

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
SEP 16 1993
OFFICE OF THE CLERK

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual; and KATHRYN L. HINKLE, an individual, on behalf of themselves and all others similarly situated,

Petitioners,

v.

JESSE BROWN, Secretary for Veterans Affairs; THE DEPARTMENT OF VETERANS AFFAIRS; THE UNITED STATES OF AMERICA; and JANET RENO, Attorney General of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Petitioners challenge the constitutionality of a Civil War–era statute that prevents veterans from retaining counsel in benefit proceedings by imposing a $10 cap on attorneys' fees. On interlocutory appeal, this Court upheld the constitutionality of the fee limitation with respect to veterans' benefit claims in general and remanded for further consideration of its constitutionality as applied to complex claims in particular. On remand and after a two-month trial, the District Court held that the fee limitation violated procedural due process and First Amendment standards as applied to a class of veterans or their beneficiaries with claims based on exposure to ionizing radiation from atomic bomb testing and atomic bombs dropped at Hiroshima and Nagasaki. The Court of Appeals for the Ninth Circuit reversed.

Petitioners respectfully submit that this Court should grant *certiorari* to review the following questions presented by the Court of Appeals' opinion:

1. Upon this Court's remand to consider the constitutionality of the fee limitation as applied to complex claims, was the District Court free to hear evidence and to make further factual findings relating to these remanded claims? If so, was the Court of Appeals free to ignore those factual findings absent a determination that they were clearly erroneous?

2. Under this Court's standard for measuring procedural due process, plaintiffs must show the *risk* of an erroneous deprivation of a property interest and the *probable value* of additional safeguards. Did the Court of Appeals err by requiring petitioners to show instead:

> — not only a risk of erroneous deprivation, but also that a significant number of petitioners' claims had been wrongly decided?
>
> — not only the probable value of a lawyer's assistance, but also that lawyers are absolutely "necessary" to ensure procedural fairness?

3. Did the Court of Appeals err in treating selected excerpts of "legislative history" to unenacted statutes as supplanting the District Court's specific factual findings regarding the operation of the veterans' benefit claims system as applied to petitioners?

4. Did the Court of Appeals err by refusing to examine petitioners' First Amendment claims under a standard of strict scrutiny that requires that the fee limitation be narrowly tailored to serve a compelling governmental interest?

PARTIES TO THE PROCEEDINGS

All of the parties are listed in the caption. The parties before this Court and the Court of Appeals for the Ninth Circuit are identical except that the appropriate successors have been substituted for defendant public officers named in their official capacity, pursuant to Supreme Court 35.3.[1] None of the parties have parent companies or non-wholly owned subsidiaries.

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[1] Albert R. Maxwell, one of the original named plaintiffs, died prior to trial; his estate is not party to this action.

In addition, the following twelve organizations have expressed their support for this Petition and their desire to file *amicus* briefs should the Supreme Court grant *certiorari* in this matter: *Colorado Agent Orange–Atomic Veterans Coalition* (Evergreen, Colorado); *Veterans Due Process, Inc.* (Portland, Oregon); *National Association of Atomic Veterans* (Salem, Massachusetts); *Vietnam Veterans of America, Inc.* (Washington, D.C.); *American Trial Lawyers Association* (Washington, D.C.); *Swords to Plowshares Veterans Rights Organization* (San Francisco, California); *AMVETS Trinity Post 7-45* (Portland, Maine); *American Civil Liberties Union* (New York, New York); *Trial Lawyers for Public Justice* (Washington, D.C.); *Radiation Health Effects Public Interest Law Group (RADLAW)* (Wheaton, Maryland); *Military Family Support Network (Desert Storm)* (Buies Creek, North Carolina), *American Veterans Committee* (Washington, D.C.).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners National Association of Radiation Survivors ("NARS"), Reason F. Warehime, Doris J. Wilson, Dolores Clapp, Marthann J. Conner, and Kathryn L. Hinkle petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the Court of Appeals for the Ninth Circuit is reported at 994 F.2d 583 (9th Cir. 1993). The

opinion of the District Court for the Northern District of California is reported at 778 F. Supp. 1096 (N.D. Cal. 1991), *amended* 782 F. Supp. 1392 (N.D. Cal. 1992). The earlier opinion of this Court is reported *sub nom. National Association of Radiation Survivors v. Walters*, 473 U.S. 305 (1985) (hereinafter *"Walters"*). All of these opinions are reproduced in the Appendix.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1992. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on June 18, 1993. (App. 148.) The jurisdiction of the federal courts in the first instance rested upon 28 U.S.C. § 1331. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the following constitutional provisions and statutes, which are set forth in full in the Appendix: Due Process Clause, U.S. Const. amend. V; Right to Petition Clause, U.S. Const. amend. I; 38 U.S.C. § 3404, limiting to $10 attorneys' fees in veterans' benefit proceedings; and 38 U.S.C. § 3405, imposing criminal penalties for violations of § 3404 (both prospectively repealed 1988).

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2 The District Court's opinion granting a preliminary injunction is reported at 589 F. Supp. 1302 (N.D. Cal. 1984). The District Court's opinion certifying the class after remand is reported at 111 F.R.D. 595 (N.D. Cal. 1986). The District Court's opinion sanctioning the government for destruction of documents and other violations is reported at 115 F.R.D. 543 (N.D. Cal. 1987).

The proposed findings of fact submitted to the District Court by the plaintiff class and named plaintiff Reason Warehime, respectively, were included in the Appendix to petitioners' Emergency Application for Stay Pending Review on *Certiorari* to Associate Justice Sandra Day O'Connor, filed July 23, 1993, and are available for review therein. Petitioners also intend to include them in any Joint Appendix filed if this Court grants *certiorari*. The District Court relied on many of these proposed findings of fact; they indicate the comprehensive and detailed scope of the record below.

STATEMENT

I. THIS COURT'S DECISION IN *WALTERS*

A. Direct Appeal of the Preliminary Injunction Ruling

This case has previously come before this Court, but in a substantially different form. In 1983, this action was filed by several disabled veterans and non-profit veterans' organizations. The original complaint contested the constitutionality of the fee limitation and accompanying criminal penalties, 38 U.S.C. §§ 3404 and 3405, on Fifth and First Amendment grounds, both facially and with respect to all types of service-connected death and disability ("SCDD") claims. After expedited discovery, plaintiffs moved for a preliminary injunction against enforcement of the fee limitation. The District Court granted the preliminary injunction, finding that plaintiffs were likely to succeed on the merits of their Fifth and First Amendment challenges. The government filed a direct appeal under since-repealed 28 U.S.C. § 1252.

In a split decision involving four separate opinions, this Court vacated the preliminary injunction and remanded for further proceedings. In the main opinion written by now-Chief Justice Rehnquist, six Justices upheld the fee limitation facially and, based on the limited record, with respect to SCDD claims in general.

Five Justices, however, agreed that the Court was leaving open a challenge to the constitutionality of the fee limitation as applied to complex claims. Justice O'Connor wrote a concurring opinion, which Justice Blackmun joined, explicitly recognizing remand of the as-applied challenge for complex claims. (App. 52-55.) In a dissenting opinion joined by Justice Marshall, Justice Brennan wrote that "a majority of the Court" did not reach the constitutionality of the fee limitation "as applied to particular categories of claims." (App. 72 at n.51.) In another dissenting opinion joined by Justices Marshall and Brennan, Justice Stevens stated outright that the fee limitation was unconstitutional. (App. 75-89.)

B. The Court's Main Opinion

In upholding the fee limitation facially and with respect to SCDD claims in general, Chief Justice Rehnquist applied the due process balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). (App. 38.) The *Mathews* balancing test weighs the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Chief Justice Rehnquist added that "'procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.'" (App. 38.)

Applying the first *Mathews* factor, Chief Justice Rehnquist discussed the private interest which would be affected by the fee limitation. His opinion for the Court stated that SCDD benefits are not strictly need-based like welfare payments on which recipients depend for their daily subsistence. (App. 50.)

Continuing under the second *Mathews* factor, Chief Justice Rehnquist stated, "[i]t would take an extraordinarily strong showing" of the risk of error and probable value of attorneys to establish a due process violation. (App. 43.) He observed that even with evidence establishing the number of claimants who were denied benefits initially and on reconsideration, but awarded benefits on appeal, "it is [not] possible to quantify the 'erroneous deprivations' among the general class of rejected claimants." (App. 44.) The Chief Justice found it "fortunate to have statistics" concerning the probable value of attorneys. (App. 44.) These statistics showed veterans with *pro bono* counsel prevailed in 18.3% of all appeals, and veterans with volunteer service representatives prevailed in approxi-

mately 16% of all appeals (*id.*), a difference of about 14%.[3] Such a difference was "no such great disparity as to warrant" concluding that the fee limitation was unconstitutional. (App. 51.)

Finally, under the third *Mathews* factor, Chief Justice Rehnquist's opinion noted that "the oft-repeated congressional purpose" for the fee limitation was to prevent veterans from having to pay part of their SCDD benefits to attorneys. (App. 40.) The opinion concluded that this governmental interest was valid whether or not "paternalistic." (App. 40.)

Chief Justice Rehnquist acknowledged that there "are undoubtedly 'complex' cases pending before the VA," but observed that "neither the District Court's opinion nor any matter in the record to which our attention has been directed tells us more than this." (App. 46.) Thus, while attorneys "might be more of a factor in preventing error in such cases, ... on this record we simply do not know how those cases should be defined or what percentage of all of the cases before the VA they make up." (App. 47.)

C. The Concurring and Dissenting Opinions

In her concurring opinion, Justice O'Connor made explicit many points which are implicit in the Court's main opinion. Justice O'Connor explained, with the agreement of a different majority, that *"the Court ... does not determine the merits of the appellee's individual 'as applied' claims."* (App. 54.)[4] She noted that plaintiffs had not brought a class action, and that the court below had not directed its findings or injunction to "a subclass of complex claims that by their nature require expert assistance." (App. 54.) Thus, "[o]n remand, the District Court is free to and should consider any individual claims that [the procedures] did not meet the standards we have described in

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3 The difference is calculated by dividing the difference between these two rates by the success rate for unrepresented claimants. Prior opinions have described the difference as 2%, calculating that figure by simple subtraction.

4 Unless otherwise indicated, all emphasis appearing in quotations has been added; deletion of internal quotes is not indicated.

this opinion." (App. 55.)[5] As importantly, Justice O'Connor stated that challenges brought by "identifiable groups ... remain open on remand." (App. 53.) Justice O'Connor clarified that to prevail, plaintiffs would need to show that there was "a 'group' with respect to which the process provided is '[in]sufficient for the large majority.'" (App. 53-54.) The group should be one "whose 'situation differs' in important respects from the typical [SCDD] claimant." (App. 54.)

In his dissenting opinion, Justice Brennan stated that this Court could not have addressed the merits of the as-applied challenge relating to complex claims, because the trial court had yet to rule on these claims. Like Justice O'Connor, Justice Brennan described the record below as only "partially developed." (App. 73.) He suggested that it was contradictory for the majority to reach any of the merits after only a preliminary injunction had been entered, while "excoriat[ing] the appellees and the District Court repeatedly for failing to muster sufficient evidence." (App. 74.)

Justice Stevens stated in his dissenting opinion that he would have struck down the fee limitation because it "impose[s] an unconstitutional restraint on individual liberty." (App. 76.) Justice Stevens observed that "[e]veryone agrees ... that there are at least some complicated cases in which the services of a lawyer would be useful to the veteran and, indeed, would simplify the work of the agency." (App. 75-76.) Furthermore, "[t]he fact that a lawyer's services are unnecessary in most cases, and might even be counterproductive in a few, does not justify a total prohibition on their participation." (App. 80.) Thus, lawyers "should be permitted in appropriate cases." (App. 81.)

D. First Amendment Issues

This Court also briefly discussed the veterans' First Amendment right to petition the government for redress of grievances. The Court reasoned that under its due process

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[5] Specifically, Justice O'Connor pointed to the claims of two individual plaintiffs which were difficult to evaluate on the preliminary record. (App. 54.)

analysis, veterans had an "opportunity" to "make a meaningful presentation." Because of that "opportunity," the First Amendment claim did not have "independent significance." (App. 51-52.) The Court distinguished two earlier cases that had recognized unions' and union members' right to retain and recommend counsel, *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967), and *Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). The Court stated that those cases should not be "extend[ed]" to "cover the situation" of veterans. *Mine Workers* and *Railroad Trainmen* concerned the right of individuals and organizations to retain or recommend counsel in proceedings where counsel was already permitted, while this case presented individual interests in "best prosecuting a claim" where attorneys had been effectively prohibited. (App. 51.)

II. THE DISTRICT COURT'S PROCEEDINGS AND LEGISLATIVE CHANGES AFTER REMAND

A. Pre-Trial Proceedings and Trial

Following remand, the District Court permitted plaintiffs to amend their complaint to bring a challenge on behalf of a particular class with complex claims. Thereafter, the District Court certified the class of "all past, present, and future ionizing radiation claimants who have, or will have, some form of 'active' claim relating to SCDD benefits before the VA." (App. 92.)[6] On the government's motion, the District Court dismissed the facial challenge to the fee limitation based upon

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[6] In certifying the class, the District Court relied on Justice O'Connor's concurring opinion. As the District Court explained, "the heart of plaintiff's constitutional challenge" on remand was "whether ionizing radiation claims are, by their very nature, so complex that the assistance of an attorney is necessary to ensure a fair and constitutionally adequate hearing." (App. 98.)

Plaintiff class members are referred to as "IR Claimants," an abbreviation of "Ionizing Radiation Claimants." Their claims are referred to as "IR Claims."

Walters, leaving intact the named plaintiffs' challenge to the fee limitation as applied to IR Claims. (*See* App. 92.)[7]

Following class certification, the parties engaged in extensive discovery concerning all aspects of the IR Claims adjudication process. That discovery included the production of more than 2,000,000 pages of documents by the Veterans Administration ("VA")[8] and numerous other federal agencies. Discovery also included 71 depositions, among them officials in every VA unit which plays a role in adjudicating IR Claims; Defense Nuclear Agency ("DNA") officials responsible for radiation dose estimates; and volunteer service representatives of major veterans organizations.

A year prior to trial, petitioners learned from an anonymous source that the government was shredding documents which had been requested in discovery. The District Court issued a temporary restraining order to prevent further destruction of evidence; petitioners were able to secure the last 25 boxes at the shredding facility. The District Court then held an evidentiary hearing and found the VA guilty of multiple violations of Federal Rules of Civil Procedure 11 and 26. The court awarded sanctions in the amount of $105,000, and later awarded additional sanctions for further failure to comply with court orders and the Federal Rules. *See NARS v. Derwinski*, 115 F.R.D. 543 (N.D. Cal. 1986).

On September 8, 1987, the District Court began a two-month trial. Dozens of witnesses testified, including individual IR Claimants, VA officials responsible for handling IR Claims, and fifteen independent experts in the fields of medicine, science, and administrative law. In addition, the

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7 The District Court rejected the government's argument that the named plaintiffs' claims were atypical because "this is not an action for benefits—it is an action challenging the constitutionality of the fee limitation as applied to all ionizing radiation claimants." (App. 100.) That the named plaintiffs did not prevail before the VA was irrelevant because "the whole point of this litigation is that plaintiffs contend they need the assistance of counsel in order to adequately prove their IR Claims." (App. 101.)

8 In 1991, the Veterans Administration became the Department of Veterans Affairs ("DVA"). *See* 39 U.S.C. § 301.

parties introduced 1500 trial exhibits and stipulated to the submission of 75,000 pages of deposition testimony.

B. Legislative Changes After Trial

After trial and while the matter was under submission, Congress prospectively repealed the $10 fee limitation as part of an overhaul of the VA adjudication system, highlighted by the creation of the United States Court of Veterans Appeals. The Veterans' Judicial Review Act ("VJRA"), Pub. L. No. 100-687 § 104 (1988), permits veterans to hire attorneys to reopen initial decisions before a regional office or to bring an appeal to the Court of Veterans Appeals, 38 U.S.C. § 5904(c)(1), and permits reasonable attorneys' fees or a contingency fee not to exceed 20%. 38 U.S.C. § 5904(c)(2) and (d)(1). In addition, regulations promulgated under the VJRA permit veterans groups to hire attorneys at all stages of the proceedings. 38 C.F.R. § 14.634(a).[9] However, the VJRA excluded pre-existing appeals and resolved claims from its scope, thus leaving out the class of IR Claimants.[10]

C. The District Court's Decision

On January 29, 1992, the District Court issued its amended findings of fact and conclusions of law, holding that the $10 fee limitation was unconstitutional as applied to IR Claimants on both due process and First Amendment grounds. On March 26, 1992, the District Court entered a stipulated judgment establishing procedures for readjudicating IR Claims with attorney assistance, which does not extend to any claims covered by the VJRA.

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9 Appeals are permitted from the Court of Veterans Appeals to the Court of Appeals for the Federal Circuit. *See* 38 U.S.C. § 7292.

10 The VJRA was designed to operate prospectively to permit the Court of Veterans Appeals enough time to begin operations and enable it to build its docket slowly. *See Prenzler v. Derwinski*, 928 F.2d 392 (Fed. Cir. 1992); 134 Cong. Record S16650 (Oct. 18, 1988). There was no intention to exclude any particular group of veterans. Thus, veterans who receive an initial denial of an ionizing radiation claim after the operative date of the VJRA are free to retain counsel.

1. Due Process Findings

The District Court began its due process analysis under *Mathews* by considering the private interest affected by the official action. As shown by statistics documenting their average annual family income and medical expenses, IR Claimants are poor, and "a substantial majority ... would rely primarily on SCDD benefits for their basic maintenance and support." (App. 115.)

The District Court next considered the risk of error and the probable value of attorneys. The court concluded that IR Claimants had made the required "extraordinarily strong showing," referred to in this Court's prior decision. (App. 142.) On the basis of a wealth of evidence presented by both sides, the District Court found that IR Claimants constituted a group that differed significantly from veterans seeking other SCDD benefits. The court's conclusion was based on six categories of fact findings:

The Claims Development Process for IR Claims Specifically. The District Court found the IR Claims development process "is far more detailed and complex than that for other SCDD claims" because of the complexity of the applicable substantive and procedural rules and regulations.[11] (App. 117.) These rules and regulations were promulgated pursuant to the mandate of the "Veterans' Dioxin and Radiation Exposure Compensation Standards Act," Pub. L. No. 98-542 (1984). (App. 116.) The rules and regulations applicable to IR

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[11] IR Claims are governed by the rules and regulations for SCDD claims generally and also rules and regulations directed to IR Claims specifically. The general rules and regulations include: the statutes; VA regulations; VA General Counsel opinions, which are not digested; BVA decisions; VA circulars; and agency manuals such as the VA Adjudication Manual, VA Program Guide, MBVA Manual, and Field Appellate Procedure Manual. (App. 115-16.) The specific rules and regulations include the complex provisions of 38 C.F.R. § 3.311b, which, among other things, sets forth three prerequisites for an IR Claim: (a) that the veteran was exposed to ionizing radiation as a result of atmospheric atomic bomb testing, the occupation of Hiroshima or Nagasaki, or other activities; (b) that the veteran developed one of 17 enumerated diseases; and (c) that the disease became manifest within a particular time period. (App. 116-17.)

Claims involve initial screening of IR Claims by VA regional offices;[12] soliciting additional information from IR Claimants;[13] preparing radiation dose estimates in several steps;[14] multiple layers of internal agency review;[15] and possible appeal.[16]

Medical Issues Related to IR Claims. The District Court found that "the proper presentation and adjudication of IR Claims will often require the marshalling of expert medical opinion and testimony." (App. 123.) The court made numerous findings concerning the difficulty of determining cancer

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[12] The VA regional office initially determines whether a submitted claim meets the three prerequisites of 38 C.F.R. § 3.311b. (App. 117.)

[13] Upon a finding that the applicant has satisfied § 3.311(b), the regional office sends a pattern letter, which requests more information than for SCDD claims generally. (App. 117.)

[14] The regional offices refer claims to the Defense Nuclear Agency ("DNA") for a radiation dose estimate pursuant to 32 C.F.R. § 218.1 *et seq.* If the claimant obtains a dose estimate at least twice the DNA dose estimate, the regional office will refer the case to an independent expert for dose reconciliation. (App. 117.)

[15] Following development of the dose estimate, the file is submitted to the Administrative Review Staff of the Compensation and Pension Service ("CPS"), a step usually not taken with other SCDD claims. The CPS makes a recommendation for allowance or denial of the claim, which the regional office must take into consideration. The regional office will issue a Notice of Decision with its rating decision on disability, based on a complex schedule with anatomical data and other criteria. (App. 118.)

[16] If the claim is denied, the IR Claimant may file a Notice of Disagreement ("NOD"), within one year. If an NOD is timely filed, the regional office will reconsider its decision. If the denial is affirmed, the regional office issues a Statement of the Case ("SOC") with the basis for its decision. The IR Claimant then may file an appeal, within sixty days of issuance of the SOC or the remainder of one year from mailing of the Notice of Decision. (App. 118.)

The claimant's appeal is reviewed by the BVA. If the BVA denies the appeal, an IR Claimant has no recourse to judicial review under the VJRA. 38 U.S.C. § 511. The IR Claimant may move to reconsider when there has been an obvious legal or factual error or with new evidence, and may reopen the claim at the regional office level. (App. 118.) The claimant is entitled to a hearing upon request at any time on any issue involved in a claim, and is allowed to introduce evidence throughout the proceedings. (App. 119.)

causation; the difficulty of determining whether the veteran's condition is covered by the disease classification regulations; the fact that 49% of IR Claimants suffer from a disease not listed in the regulations; the lack of standards for assessing the time of manifestation for a disease; and difficulties concerning the accuracy of the radioepidemiological tables used by the VA. (App. 119-23.)

Scientific Issues Related to IR Claims. The District Court found that "the scientific issues involved in IR Claims are extremely complex and beyond the capacity of a lay-claimant to understand." (App. 123.) The court found considerable disagreement within the scientific community over calculating radiation dose estimates. The court further found that the VA's generic dose reconstructions were less accurate than individualized dose reconstructions. (App. 126-27.)

Factual Development of IR Claims. The District Court found that "properly developing the facts underlying [IR Claims] is an extremely intricate undertaking." (App. 128.) There is "[a] plethora of information" which is needed to develop an IR Claim, including: the location of the veteran at the time of explosion; the activities undertaken at the time; the type of bomb; time of exposure; length of exposure; and presence or absence of protective shielding. (App. 128.) Obtaining much of the necessary information is difficult, requiring use of the Freedom of Information Act, declassification through the Secrecy Act, and use of the Privacy Act. (App. 128-29.)

Adversarial Nature of IR Claims Processing. The District Court found that "[n]o evidence was presented at trial which supports the notion that the supposedly informal and non-adversarial nature of the VA adjudication system for IR Claims serves as a safeguard for claimants." (App. 130-31.) Instead, the court made findings that the presumptions which should have protected IR Claimants were "illusory."[17] The VA per-

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[17] The presumptions are illusory because the manifestation period, which must be shown to use the presumption of 38 C.F.R. § 3.309, itself is difficult to prove; the presumptive periods have been misapplied; and the threshold requirements of 38 C.F.R. § 3.311b have been used to deny claims despite the presumption. (App. 129-30.)

formed very little factual development of IR Claims. For example, in a random selection of 674 IR Claims, the VA failed to obtain a dose estimate in 59% of the cases and also failed to conduct a physical exam in 48%.[18] (App. 131.) The VA actively discouraged IR Claimants from invoking their right to a hearing, and hearings were held in fewer than 6% of IR Claims.[19] (App. 132-33.)

Inadequacy of Service Representatives in Handling IR Claims. The District Court found that the availability of volunteer service representatives does not provide an adequate safeguard for IR Claims. They have a "'crushing'" caseload, are not trained in handling IR Claims, do little factual development, rarely request hearings, frequently meet with the claimant for the first time only an hour prior to the hearing, often waive the claimants' rights, and often prepare inadequate briefs. (App. 133-35.) The court noted that service representatives were adequate for more routine SCDD claims. (App. 133.)

In the face of these and other demonstrated shortcomings in the system, the District Court found that attorneys were crucial to proper presentation of IR Claims. Specifically, the District Court found that IR Claims "involve[] a wide variety of tasks for which attorneys are trained and particularly well-suited." Among those tasks are the use of the FOIA, the Secrecy Act, and the Privacy Act to obtain government documents; claim development; compliance with procedural requirements; development and use of expert testimony; legal research and writing; and asserting legal challenges to mistaken agency actions. (App. 135-36.) The probable value of attorneys was further demonstrated by proof that "IR Claimants who employ attorneys have had significantly higher success rates than those relying on volunteer service representatives."

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[18] This problem is compounded by an institutional incentive to underprepare IR Claims because the VA's internal "work product" schedule provides no additional work credit for IR Claims. (App. 131.)

[19] Hearings are especially important because claimants who have hearings have a substantially higher success rate than claimants who do not. (App. 132-33.)

(App. 137.) In fact, the evidence showed that the IR Claimants represented by counsel have a 2400% higher success rate than those proceeding with service representatives.[20]

Finally, the District Court weighed the asserted governmental interest in adhering to the fee limitation. The court found that whatever the merits of the fee limitation previously, it had none after the fee limitation was repealed prospectively by the VJRA and paid counsel were permitted in the system. There was "no rational manner in which the government interest ... could be one thing for claimants who filed their NOD prior to November 18, 1988 and another for those who file after." (App. 141.)

2. First Amendment Findings

The District Court also held that the fee limitation infringed upon petitioners' First Amendment right to petition the government for redress. The District Court recognized that the First Amendment protects both individual and collective activity. (App. 144-45.) In analyzing the First Amendment issue, the District Court relied on two cases decided after this Court's earlier decision in this action. (App. 146, *citing Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988); *Meyer v. Grant*, 496 U.S. 414 (1990).) The District Court held that these cases extended to individual activity First Amendment protection previously limited to collective activity. Under these cases, petitioners possessed an interest in paying another to assist them in petitioning the government for redress. (App. 146.) Given that interest, the fee limitation would have to serve a compelling governmental interest and be narrowly tailored. (App. 146.) The fee limitation did not serve a compelling governmental interest because the VJRA undermined its legitimacy; the fee limitation was not narrowly tailored because other measures could be used to protect IR Claimants from unscrupulous attorneys or to create informality in the IR Claims adjudication process. (App. 146-47.)

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[20] The difference is calculated in the same manner described in note 3, above. Evidence at trial showed that the percentage of IR Claimants who succeed with counsel is 16.13%; the percentage of IR Claimants who succeed without counsel is .64%. (*See* App. 20.)

III. THE NINTH CIRCUIT'S OPINION

On November 24, 1992, the Ninth Circuit reversed the District Court, treating *Walters* as determinative of the as-applied claims, notwithstanding this Court's remand. The Ninth Circuit reasoned that "the district court's finding regarding the complexity of law and procedures of IR Claims is not sufficient to establish a due process violation." (App. 17.) In so holding, the Ninth Circuit relied heavily on this Court's decision reversing the preliminary injunction on the facial claim. For example, the Ninth Circuit stated that this Court had rejected the district court's finding that the SCDD benefit process in general was complex, because that finding was based on a discussion of that process in the abstract. (App. 16.) The Ninth Circuit also stated that only by showing that a "significant number" of IR Claimants were wrongly denied benefits due to the medical and scientific complexities of their claims, could plaintiffs show that IR Claims are "materially different from all SCDD claims controlled by *Walters*." (App. 17.) The Ninth Circuit cited Chief Justice Rehnquist's opinion in *Walters* for the proposition that "'process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them.'" (App. 15.)

Guided by its restrictive interpretation of *Walters*, the Ninth Circuit held that the District Court had erred in rejecting the governmental interest in the fee limitation. The Ninth Circuit stated that this Court had found "the introduction of lawyers into administrative proceedings is likely to have serious adverse consequences." (App. 11.) Accordingly, the District Court's "dismissal of the potentially detrimental effects of increasing the number of lawyers appearing before the VA severely discounts the Supreme Court's finding in *Walters*." (App. 12.) Even though Congress had largely eliminated the fee limitation in the VJRA, the Ninth Circuit inferred that the VJRA "reaffirmed the government's interest in the fee limitation." (App. 9.)

More fundamentally, the Ninth Circuit held that the District Court had improperly evaluated the risk of error and the probable value of attorneys. As to the risk of error, the Ninth Circuit held that plaintiffs failed to show the fee limita-

tion "has produced or is substantially likely to produce a significant number of wrongful denials of claims." (App. 15.) As the Ninth Circuit explained, the risk of error would be established only if "a significant number of IR Claimants have been denied benefits because they were unable to follow procedures necessary to pursue their claims"; even then, IR Claimants would have to show that they were denied benefits "due to the medical and scientific complexities of IR Claims." (App. 17.) Viewed against this standard, the District Court's extensive fact findings regarding procedural, medical, and scientific complexity of the IR Claims adjudication process were inadequate. In evidentiary terms, IR Claimants needed to show "how frequently such errors actually occur in the VA system." (App. 18.)

As to the probable value of attorneys, the Ninth Circuit held that plaintiffs failed to show that attorneys were strictly "*necessary*." (App. 20.) As the Ninth Circuit explained, "the issue is whether the presence of attorneys would 'sharply diminish' the probability of error." (App. 21.) The Ninth Circuit reasoned, however, that this Court had already found that attorneys were not necessary for presenting SCDD claims. (App. 20.) Thus, even though the Ninth Circuit accepted the District Court's findings concerning the "many tasks for which attorneys particularly are well suited," those findings were not sufficient to show the probable value of attorneys. (App. 20.) Moreover, the Ninth Circuit dismissed the District Court's finding that IR Claimants represented by lawyers were significantly more likely to prevail than claimants not represented by counsel. Instead, the Ninth Circuit deferred to the government's speculative argument that IR Claimants with lawyers might have been more successful because they had stronger claims than the IR Claimants without lawyers. (App. 20.)

Finally, the Ninth Circuit held that because the fee limitation did not violate due process, it also did not infringe upon any First Amendment right. (App. 22.) The Ninth Circuit acknowledged that the First Amendment protects only collective activity taken to achieve meaningful access to the courts (App. 21), but questioned whether individuals receive similar

protection. Further, it questioned whether meaningful access to administrative agencies is constitutionally equivalent to meaningful access to courts. (App. 22.)

REASONS FOR GRANTING THE PETITION

If the Court of Appeals' decision is permitted to stand, a group of more than 10,000 disabled veterans and their families will be denied an opportunity to seek veterans' benefits with the aid of counsel.[21] These veterans are survivors (or in many instances victims) of some of the most hazardous duties in the military service. They have suffered from cancer and other serious diseases as a direct result of exposure to ionizing radiation from atomic bombs. These veterans and their families are unable to hire attorneys, even though their veterans' benefits claims are especially complex and cannot be prepared adequately and fully without attorney assistance.[22] Despite the passage of legislation that disapproved of the antebellum fee limitation and abolished it for other veterans with claims for veterans' benefits, the remaining class of IR claimants still cannot hire lawyers. As a consequence, many veterans and their families with meritorious claims will never receive the veterans' benefits to which they are entitled.

The Court of Appeals' decision will work this injustice because it failed to follow this Court's mandate in *Walters*, applied a heightened and constitutionally unsound standard for procedural due process, accepted inappropriate indicia of legislative history, and refused to recognize the veterans' First Amendment right to petition the government for redress. If followed by other courts, the Court of Appeals' decision threatens to work an injustice in other cases as well. This Court should grant *certiorari* to determine whether the Court

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21 Within days of entry of the Ninth Circuit mandate, the DVA suspended the ongoing readjudication of IR Claims, which had been initiated with attorney assistance.

22 This Court has accepted that the fee limitation renders it impossible to hire an attorney. *See United States Department of Labor v. Triplett*, 494 U.S. 715, 721-22 (1990) (*discussing Walters*).

of Appeals has incorrectly reformulated standards for assessing deprivations of due process and First Amendment rights.

I. THE NINTH CIRCUIT MISREAD *WALTERS* AS BEING DISPOSITIVE OF PETITIONERS' AS-APPLIED CHALLENGE ON REMAND

The District Court followed this Court's mandate, but the Ninth Circuit failed to do so. In reversing, the Ninth Circuit adopted the logical fallacy that this Court's prior description of SCDD claims in general governed the unique issues raised by IR Claims in particular. The Ninth Circuit treated this Court's decision in *Walters* as barring the as-applied challenge brought by IR Claimants, and decided the fact-intensive, as-applied challenge without reference to the record or deference to the District Court's factual findings. In so doing, the Ninth Circuit ignored important differences between the case as it now stands and as it stood when last reviewed by this Court. *See Utah Pub. Service Comm'n v. El Paso Nat'l Gas Co.*, 395 U.S. 464 (1969) (vacating antitrust decree for failure to follow mandate on remand).

When last before this Court, the case involved an appeal of a preliminary injunction. This Court had before it only an incomplete record, and not the comprehensive and detailed fact findings developed after remand. Moreover, this Court's earlier decision considered the challenge to the fee limitation facially and with respect to all SCDD claims in general. The Court neither reached nor resolved the challenge to the fee limitation as applied to complex claims, but instead remanded for further proceedings. Thus, this Court's *Walters* decision not merely permits but affirmatively requires consideration of the fee limitation as applied to IR Claims.

The District Court, in permitting plaintiffs to proceed on behalf of a class of veterans or their beneficiaries with especially complex claims, correctly focused on substantive and procedural issues unique to IR Claims. The District Court made a detailed examination of: (1) the claims development process for IR Claims specifically; (2) medical issues related to IR Claims; (3) scientific issues related to IR Claims; (4) factual development of IR Claims; (5) the adversarial nature of IR

Claims processing; and (6) the inadequacy of service representatives in handling IR Claims. In contrast to the necessarily limited factual findings previously reviewed by this Court at the preliminary injunction stage, the District Court made extensive factual findings on the basis of evidence received during a two-month trial. Pursuant to this Court's mandate, the District Court found that petitioners had made an extraordinarily strong showing of the risk of error and the probable value of attorneys. (App. 142.)

The Ninth Circuit erred by treating this Court's discussion in *Walters* of the SCDD claims process as supplanting the District Court's factual findings regarding IR Claims on remand and after trial. Indeed, the Ninth Circuit's opinion is remarkable for the absence of references to the voluminous record developed on remand.

Review of the Court of Appeals' opinion will confirm that the Ninth Circuit incorrectly viewed *Walters* as foreclosing an as-applied challenge by IR Claimants. For example, the Ninth Circuit observed that "[i]n describing the procedure for processing *[SCDD] claims*, the Supreme Court in *Walters* noted that '[t]he process is designed to function throughout with a high degree of informality and solicitude for the claimant.'" (App. 5.) The Ninth Circuit further stated, "[i]n *Walters*, the Supreme Court specifically rejected the district court's finding at the preliminary injunction stage that *the SCDD benefits process* was complex because that finding was based on a discussion of that process in the abstract." (App. 16.) On this basis, the Ninth Circuit concluded, "[t]he Supreme Court's reasoning in *Walters* indicates that the district court's finding regarding the complexity of law and procedures of *IR Claims* is not sufficient to establish a due process violation." (App. 17.)

Similarly, in rejecting the District Court's finding regarding the probable value of attorneys, the Ninth Circuit stated that *Walters* contained a finding that lawyers are not "*necessary*" to assist SCDD claimants. (App. 20, original emphasis.) The Ninth Circuit also stated that its conclusions about the negative impact of lawyers were compelled by "a finding in *Walters*." (App. 11.)

Another indication of the Ninth Circuit's disregard of this Court's mandate on remand is the absence of discussion of the as-applied challenge brought by individual IR Claimants, such as Reason Warehime. Justice O'Connor specifically noted the claims of individual veterans who were named plaintiffs, and remanded for consideration of their claims. (App. 54.) On remand, the District Court found that the VA had inadequately adjudicated Mr. Warehime's claim (App. 129), after "an almost interminable string of lengthy delays, poor fact development and other forms of agency inaction and neglect which are both unjustified and clearly not in the claimant's interest." (App. 133.)

In effect, the Ninth Circuit has nullified this Court's remand. If this Court had already found that the IR Claims process was not complex, that lawyers were not necessary, and that introduction of lawyers into the system would have a negative impact, then there would have been no reason to remand. Under the Ninth Circuit's view of *Walters*, there could be no conceivable evidentiary showing that would establish a due process violation for any group of complex claims. That five Justices voted to remand confirms that the Ninth Circuit erred in viewing *Walters* as foreclosing petitioners' as-applied challenge.

The present petition would have less merit if the Ninth Circuit had considered the District Court's factual findings and found them clearly erroneous. That the Ninth Circuit has ignored those factual findings, in and of itself warrants this Court's review. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986).[23]

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[23] This Court's description of the Court of Appeals' approach in *Icicle Seafoods* equally applies here: "If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were 'clearly erroneous' within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own." *Id.* at 714.

II. THE NINTH CIRCUIT IMPROPERLY MODIFIED THE *MATHEWS* TEST FOR PROCEDURAL DUE PROCESS

Although the Ninth Circuit purports to follow the *Mathews* balancing test for determining whether a statute violates procedural due process, it has altered significant elements of the test in applying it to this case. Under *Mathews*, petitioners were required to show the risk of erroneous deprivation as a result of the fee limitation, and the "probable value" of attorneys. *Mathews*, 424 U.S. at 335. The Ninth Circuit, however, required proof not only of the risk of an erroneous deprivation, but of an *actual error*; likewise, the Ninth Circuit required proof not only of the probable value of attorneys, but that attorneys were *absolutely necessary*. The Ninth Circuit's restrictive reformulation of the *Mathews* balancing test has wide-ranging implications for petitioners and other citizens raising due process challenges, which warrant this Court's review.

A. The Risk of Erroneous Deprivation

The Ninth Circuit improperly required a showing that the fee limitation in fact resulted in erroneous deprivations of veterans' benefits. As the Ninth Circuit explained, it is necessary that "a significant number of IR Claims have been denied" due to procedural, medical, and scientific complexities. (App. 17.) The opinion includes repeated statements to the effect that IR Claimants would need to show "how frequently such errors actually occur in the VA system," and how the fee limitation "has produced or is substantially likely to produce a significant number of wrongful denials of claims." (App. 18, 15.) Thus, under the Ninth Circuit's view, IR Claimants cannot prevail even by showing, as the District Court found, "the risk of erroneous deprivation" through extreme complexity and repeated errors in the operation of the IR Claims system itself. (App. 135.)

The vice of the Ninth Circuit's analysis is that it confuses the due process challenge to the fee limitation with the merits of the IR Claimants' underlying veterans' benefit claims. Whereas the *Mathews* test focuses on process, not outcomes, the Ninth Circuit's requirement of an actual deprivation

premises a due process challenge on proof of the merits of plaintiffs' claims. As shown by this case, even specific proof of and findings regarding substantive and procedural complexity in the IR Claims adjudication process, the high risk of erroneous deprivation, and the disparity in results for IR Claimants with and without counsel, will not suffice to establish a due process violation. There is little else an IR Claimant or any other due process challenger could show, short of establishing the merits of his or her underlying case.[24]

IR Claimants who were able to show success on the merits would not need to bring a constitutional challenge and would not need the assistance of an attorney. Of course, a litigant who was able to show an erroneous denial of a benefit claim would have an especially compelling case. That such a showing would be sufficient does not make it necessary. Especially on a class-wide basis, proof of the risk of erroneous deprivation of benefits need not and often cannot be premised on proof of error in individual claims. Even upon a showing of actual error, the due process analysis would still require a causal connection—that the fee limitation and medical and scientific complexities of IR Claims, rather than unrelated factors, led to the actual deprivation. It is unclear how many erroneous deprivations would be required to justify relief on behalf of a class of 10,000 IR Claimants.

Carried to its logical conclusion, the Ninth Circuit's opinion would require petitioners to show that a large majority of all claims were *wrongly* decided. Nothing in *Walters* suggests,

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[24] For the same reasons, the Ninth Circuit's alternative formulation of a "substantial likelihood of erroneous deprivation" is superfluous. If something short of proof of an actual deprivation would show the substantial likelihood of erroneous deprivation, it would be exactly what IR Claimants showed— procedural and substantive complexity, the high risk of erroneous deprivation, and the disparity in results for IR Claimants with and without counsel.

let alone justifies, such a radical transformation of the *Mathews* test.[25]

B. The Probable Value of Attorneys

Even worse, the Ninth Circuit rejected the *Mathews* factor of the "probable value" of attorney assistance to IR Claimants. Instead, the Ninth Circuit required a showing that attorneys would be strictly "*necessary*." (App. 20, original emphasis.)

The Ninth Circuit apparently accepted the District Court's factual finding that "IR Claims present many tasks for which attorneys are particularly well-suited." (App. 20.) However, the Ninth Circuit explained that "the issue is whether the presence of attorneys would 'sharply diminish' the probability of error." (App. 21.) Thus, the Ninth Circuit rejected petitioners' showing of a 2400% disparity between claims handled with and without attorney assistance, which expert testimony established was statistically significant. According to the Ninth Circuit, the 2400% disparity in success rates between represented and unrepresented claimants would be meaning-

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[25] In reformulating the *Mathews* balancing test, the Ninth Circuit cited *Walters* for the proposition that "process which is sufficient for a large majority of a group of claims is by constitutional definition sufficient for all of them." (App. 15.) The Ninth Circuit incorrectly reads this language as supporting its requirement of an actual deprivation. This interpretation is faulty because the *Walters* Court, and *Parham v. J.R.*, 442 U.S. 584, 617 (1979), on which it relied, were restating one of the principles contained in *Mathews*, namely that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." (App. 47-48.) The references in *Walters* and *Parham* to a "large majority of a group of claims," far from restricting the scope of due process challenges, were meant to enlarge it. As Justice O'Connor explained in her concurring opinion in *Walters*, even where process was sufficient for a large majority of one group of claims, it might not be sufficient for a large majority of a different group of claims, "whose 'situation differs' in important respects." (App. 54.) Likewise, in *Parham*, this Court held that Georgia's procedures for commitment of minor children to mental health institutions were not unconstitutional *per se*, but expressly left open a challenge as applied to individual cases. *Parham*, 442 U.S. at 617. *Parham* also left open challenges on behalf of a class of children who were wards of the state, who, the Court noted, had cases that may have differed from those of other children. *Id.* at 619.

ful only if the relative merits of the cases, successful and unsuccessful, were compared to ensure that attorneys had not selected the strongest ones.[26] Such an analysis cannot be performed without examining all claims asserted on behalf of thousands of class members as if they had been prepared adequately and fully; that is, as if they had been prepared with attorney assistance. Thus, the Ninth Circuit test requires that benefit claimants challenging a statute show what the outcomes in particular cases would be if the statute were struck down.

Like the requirement of an actual deprivation, the requirement that attorneys are strictly necessary conflicts with *Mathews*. While the Ninth Circuit required an empirical showing of necessity, *Mathews* envisioned a balancing test with a broader focus on the probable value of additional safeguards.

Here, petitioners presented compelling evidence and the District Court made factual findings concerning substantive and procedural complexity in the IR Claims adjudication process, the risk of erroneous deprivation, and the many tasks for which lawyers are well-suited. There is no dispute that IR Claims are difficult to establish, that the success rate generally is low, that the rules and regulations are complex, and that retained counsel can make the difference between a futile and successful claim. This showing, coupled with the gross disparity in success rates between represented and unrepresented claimants, demonstrated the "probable value" of attorneys, as required under *Mathews*.

The Ninth Circuit read *Mathews* to require that litigants produce an empirical showing of the benefit of additional safeguards. That was error for the very good reason that it would be an impossible requirement to satisfy. IR Claimants

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[26] Ignoring the District Court's finding based upon expert testimony, the Ninth Circuit substituted its own speculative findings that petitioners' statistical study should be discounted because attorneys might have selected the better cases. (*See* App. 20.) The District Court properly rejected that unwarranted suggestion for obvious reasons—attorneys working for $10 have little incentive to "cherry-pick" their cases.

challenged the constitutionality of the fee limitation on the ground that they needed lawyers to present their claims successfully. Borrowing a page from Joseph Heller's *Catch-22*, the Ninth Circuit stands that challenge on its head: to be entitled to lawyers, IR Claimants must show that they would win their claims; but to win their claims, IR Claimants need lawyers.

III. THE NINTH CIRCUIT ERRED BY HOLDING THAT THE DISTRICT COURT'S FACTUAL FINDINGS WERE OVERRIDDEN BY ISOLATED AND UNRELIABLE INDICIA OF LEGISLATIVE HISTORY

The Ninth Circuit rejected the District Court's factual findings in favor of supposed Congressional findings regarding the veterans' benefit claim process. (App. 9-10, 16, 19.) In so doing, the Ninth Circuit abdicated its role in evaluating the constitutionality of the fee limitation. *See, e.g., Sable Communications of California v. Federal Communications Comm'n*, 492 U.S. 115, 129 (1989).

In analyzing the fee limitation, enacted more than a century ago, the Ninth Circuit considered legislative history to contemporary bills which were not passed. The Ninth Circuit cited a few remarks scattered in Congressional reports about the general "fairness" of the DVA system, not even for SCDD claims, but rather for all disability, education, pension and other benefits.[27] These remarks appear in reports to proposed bills concerning judicial review of DVA decisions. Neither report—House Report No. 963 and Senate Report No. 418—focused on IR Claims. Contrary to the Ninth Circuit's implication (App. 16), neither proposed bill was ever enacted. Accordingly, neither constitutes "legislative history of the

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[27] The Ninth Circuit cited a Senate Report which referred to a "strong and vital system of veterans service officers who provide excellent representation at no cost to claimants." S. Rep. No. 418, 100th Cong., 2d Sess. at 64. The Ninth Circuit also cited a House Report containing excerpts of comments by an academician who characterizes the DVA system generally as "fair" and "permeable on a daily and individual basis by service organizations and state agencies who represent veterans." H.R. Rep. No. 963 at 5807-08. These remarks can hardly be characterized as "Congressional findings"; they are neither fact-specific nor supported by any evidence concerning the adequacy of volunteer service representatives in complex IR Claims.

VJRA." As this Court has cautioned, because "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress," it is "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law." *See Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).[28]

Moreover, despite its reliance on Congressional findings, the Ninth Circuit overlooked the only Congressional findings expressly focused on IR Claims, which appear in the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542. The Act required the VA to promulgate consistent rules and regulations for handling IR Claims and Agent Orange Claims. In passing it, Congress found that radiation-related claims, "especially those involving health effects with long latency periods[,] present adjudicatory issues which are significantly different from issues generally presented in claims based upon the usual types of injuries incurred in military service." Pub. L. 98-542 § 2 (12).[29]

Finally, the Ninth Circuit misconstrues the impact of the VJRA on petitioners' claims. The VJRA lifted the fee limitation prospectively: veterans may now hire attorneys after denial of their SCDD claims, and pay a reasonable fee or a contingency fee of up to 20%; veterans groups may hire attorneys at any stage of SCDD claims. 38 U.S.C. § 5904(c)(2) & (d)(1); 38 C.F.R. § 14.634(a).

As a new piece of legislation introduced in Conference and distinct from earlier House and Senate bills, the VJRA was accompanied by only one piece of legislative history, the Joint Explanatory Statement. 134 Cong. Rec. H10344-10351 (daily

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[28] *See also Red Lion Broadcasting Co., Inc. v. Federal Communications Comm'n*, 395 U.S. 367, 382 n.11 (1969); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47, *modified on other grounds*, 339 U.S. 908 (1950).

[29] For example, Congress found that existing VA procedures were inadequate because film badges used to measure radiation doses "often provide an incomplete measure of radiation exposure, ... were not issued to most of the participants in nuclear tests, often provided questionable readings, ... and were worn for only limited periods." Pub. L. 98-542 § 2 (9).

ed. Oct. 19, 1988) and 134 Cong. Rec. S16650-16658 (daily ed. Oct. 18, 1988), *reprinted in* 1988 U.S.C.C.A.N. 5834-5855. The Joint Explanatory Statement did not refer to any of the purported Congressional findings cited by the Ninth Circuit. To the contrary, it contained many statements criticizing the unfairness of the fee limitation and the reasons for its repeal. *See, e.g.*, 134 Cong. Rec. S16642 (October 18, 1988) (statement of Sen. Cranston).[30] Legislators viewed the fee limitation as particularly pernicious with respect to complex cases such as IR Claims. *Id.* at S16643.

IV. THE NINTH CIRCUIT ERRED BY HOLDING THAT PETITIONERS DID NOT HAVE A FIRST AMENDMENT RIGHT TO PETITION THE GOVERNMENT FOR REDRESS BY HIRING ATTORNEYS

Finally, the Ninth Circuit's analysis of petitioners' First Amendment challenge to the fee limitation is also constitutionally defective. Indeed, the Ninth Circuit did not apply a First Amendment test at all, but instead expressly indicated that it would collapse the First Amendment issues into its due process analysis. (App. 22-23.) The tests, however, are distinct. As decisions of this Court have stated repeatedly, any restriction of a First Amendment right must be "narrowly tailored to serve a compelling governmental interest." *See NAACP v. Button*, 371 U.S. 415 (1963); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988).

By treating the due process and First Amendment challenges as indistinct, the Ninth Circuit essentially held that petitioners lacked any First Amendment interest in petitioning the government for redress. This treatment of petitioners' First

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30 The VJRA also undermined the Ninth Circuit's view that the fee limitation furthers a governmental interest in reducing increased administrative costs. The legislative history of the fee limitation discloses that the original and only rationales for the fee limitation were to preserve the VA benefits undepleted by attorneys' fees and to prevent overreaching by unscrupulous attorneys. These concerns are mooted by Congress's decision to permit veterans' benefit claimants to hire lawyers.

Amendment claims is constitutionally unsound. The right to petition the government is an "undeniable" attribute of national citizenship, *United States v. Cruikshank*, 92 U.S. 542, 552 (1875), "cut from the same cloth as the other guarantees of the [First] Amendment." *McDonald v. Smith*, 472 U.S. 479, 485 (1985). Thus, this Court has recognized in a series of cases that the assistance of an attorney can be an integral part of protected speech and that representation by counsel forms a component of the right to petition the government for redress. *Button*, 371 U.S. 415; *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 n.32 (1976).[31]

The Ninth Circuit purports to distinguish the long line of First Amendment jurisprudence concerning assistance in speaking to and petitioning the government, on the grounds that it concerns the rights of organizations rather than individuals. If there were any doubt before, there is no doubt now that this asserted distinction is not valid. This Court decided two cases after its decision in *Walters* that recognize that the First Amendment protects not only organizations but also individuals who wish to hire assistance in the exercise of their First Amendment rights. *Riley*, 487 U.S. 781; *Meyer v. Grant*, 486 U.S. 414 (1990). Under the *Riley* and *Meyer* decisions, petitioners have a protected First Amendment interest in hiring counsel to speak for them.

In *Riley*, this Court struck down a regulation which limited the amount a charity could pay a professional fundraiser. The

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[31] The government has never disputed that petitioners' IR Claims fall within the scope of the Petition Clause. Moreover, as the District Court noted, petitioners' grievances have political elements as well: these grievances, which implicate issues related to atomic bomb testing, safety of nuclear devices, and governmental responsibility to veterans, have attracted a great deal of public attention and led to the passage of legislation containing significant reforms of the DVA benefits system. (App. 145.) That petitioners' grievances also involve monetary elements has no effect on their protected status. *See United Mine Workers* 389 U.S. at 223; *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 633 (1980).

Court reasoned that the First Amendment protected the ability to pay for assistance in expression just as it protected the substance of the expression itself, because "a statute regulating how a speaker may speak directly affects that speech." 487 U.S. at 789 n.5. In *Meyer*, this Court invalidated a regulation which prohibited the use of paid circulators to gather signatures on initiative petitions for use in state elections. Again, the Court reasoned that "[t]he First Amendment protects [speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." 486 U.S. at 424. Much like the professional fundraisers and paid circulators, attorneys help IR Claimants present their points of view more effectively.

Because IR Claimants have a First Amendment protected interest in retaining counsel, the Ninth Circuit should have analyzed the fee limitation under the well-established First Amendment standard. If the Ninth Circuit had applied this standard, it would have found, as did the District Court, that the fee limitation neither served a compelling governmental interest nor was narrowly tailored. (App. 146-47.)

Even assuming that any governmental interest in the fee limitation exists after the VJRA, it is only the interest in ensuring that IR Claimants do not split their benefits award with an attorney. That purported governmental interest is not legitimate, much less compelling, under First Amendment standards, especially since other SCDD claimants can split their fee awards with an attorney under the VJRA. This Court has held unconstitutional a similar "paternalistic premise," when it rejected the notion that "charities' speech must be regulated for their own benefit." *Riley*, 487 U.S. at 790-91. The Court reasoned that "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Id.*

Moreover, the fee limitation is not narrowly tailored. This Court has stated repeatedly that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Button*, 371 U.S. at 433. As the District Court recognized, there are numerous narrowly tailored measures that would better serve any

governmental interests in protecting IR Claimants from unscrupulous attorneys, short of denying access to attorneys in all cases. (App. 147.)

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari*.

Dated: September 15, 1993

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